HJ. P. SHAUKAT ALI GHANI & ORS.

v.

LEE KHENG GNOH & ANOTHER CASE

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 425 OF 1986]
22 APRIL 1988

CIVIL PROCEDURE: *Summons for directions - Petition filed by shareholder of company - Whether directions by High Court proper in law.*

This was an appeal by the appellants against an order made upon hearing summons for directions made pursuant to O. 88 r. 7(1), Rules of the High Court 1980 whereby it was ordered that monies payable to the third respondent in respect of a sale of land be paid into Court; that the affidavit filed in support of the petitioner was admissible in evidence without the deponent being examined; and that evidence of certain facts be received at the trial by statements on oath of information and belief. The respondent/petitioner had filed a petition *inter alia* for an order that the first and second respondents pay into Court proceeds of the sale of land belonging to the third respondent and for that the first and second respondents to purchase her shares in the third respondent.

Held:

[1] The order that the proceeds of sale be paid into Court should be considered at the trial as it was a substantive matter under one of the prayers in the petition.

[2] The appellants had the right to cross-examine the deponent of the affidavit which was filed in support of the petition.

[3] The respondents had to prove facts. The statements which were made on oath of information and belief was hearsay.

[Appeal allowed with costs.]

Legislation referred to:
Companies Act 1965, s. 181
Rules of the High Court 1980, O. 88 r. 7(1), O. 25

For the appellants - M.S. Murthi; M/s. Darshan Singh & Co.
For the respondent - Allen T. Muttiah; M/s. Allen Muttiah & Co.

JUDGMENT

Wan Hamzah SCJ:

Originating Petition No. 2 of 1985 was brought by Lee Kheng Gnoh (the petitioner) originally only against Haji P. Shaukat Ali bin Ghani (the first respondent) and Mohamed Abdul Kader a/1 Shaukat Ali (the second respondent). Subsequently Shaukat Lliaisu Sdn. Bhd. was added as the third respondent. The facts set out in the petition are as follows. The shareholders of the third respondent company consist of the petitioner, the first respondent and the second respondent. Together, the first and the second respondents own 51% of the total shares.

The petitioner complains that the first and the second respondents "have wantonly and discriminately conducted the affairs of the company in a manner burdensome, harsh, wrongful and oppressive to the petitioner in utter disregard to her rights and interest as a shareholder". The following are the particulars of the alleged wrongful manner in which they conducted the affairs of the company:

(a) failing to account for monies received for and on behalf of the company;

(b) failing to render audited accounts of the company for the years 1980 to 1984;

(c) failing to serve notices of the annual general meetings to the petitioner for the years 1980 to 1983;

(d) failing to call an extraordinary meeting to ratify the disposal of the whole of the company's assets;

(e) depriving the petitioner of her rights as a shareholder;

(f) paying moneys due to the company into the account of the first respondent for his personal advantage.

The petitioner alleges that in January 1984 the first and the second respondents entered into an agreement with Phor Tay Sin Development Sdn. Bhd. for the sale to the company of land belonging to the third respondent for the price of RM4,908,396, and she has not been able to ascertain in whose possession the proceeds of the sale are. The petitioner prays for an order against the first and the second respondents to pay into Court all moneys belonging to the company and the price of the sale of the company's lands. She asks for an order that the first and the second respondents should buy up her shares at a fixed price. Alternatively she prays that the company be wound-up.

In September 1985 the petitioner filed summons for direction reference No. 1161/1985. On 22 September 1986 Dzaiddin J heard the summons and gave an order in terms. The respondents filed notice of appeal dated 21 October 1986, and subsequently memorandum of appeal dated 16 January 1987. When the appeal came up for hearing before us, the respondents/ appellants proceeded on three grounds of appeal only and abondoned the rest. First it was contended that the learned Judge erred in allowing the petition to be amended by joining the third respondent company as a party. However, as pointed out by Counsel for the petitioner and as shown by the appeal record, the order for adding the third respondent company as a party was a separate order made on 28 October 1985 on the hearing of a separate application. The appeal record does not show that a notice of appeal was filed against that order.

Another ground of appeal is that the Judge erred in law in making a substantive order. This refers to item No. 5 of the order, which directs that all moneys due to Shaukat Lliaisu Sdn. Bhd. by Phor Tay Sin Development Sdn. Bhd. be paid into Court. It was contended by the respondents that the Judge should not have made a substantial order but should have given merely directions as set out under O. 25 of the Rules of the High Court. In fact the summons in this case was not a summons for directions under O. 25. The summons bears the heading "Summons for Direction Pursuant to O. 88" and correctly so as it was filed in a petition under s. 181 of the Companies Act, *vide* r. 7(1) of O. 88. We agree with the respondents that item No. 5 is an order on a substantive matter under one of the prayers in the originating petition. In our judgment a substantive order should not be made at the hearing of summons for directions brought either under O. 88 or O. 25. The matter under item No. 5 should be considered at the trial, and it should be deleted from the order.

Another ground of appeal is directed against items No. 6 and 7 of the order of 22 September 1986. Under item No. 6 it was directed that the statements in the affidavit of the petitioner paras. 1 to 24 and para. 28 be admissible in evidence at the trial without calling as a witness the maker of the statements. The maker of the statements means the petitioner herself. It is up to the petitioner whether to give oral evidence at the trial or not to do so, but the respondents should not be prevented from cross-examining her on her statements in the affidavit. Item No. 6 of the order should be read subject to the right of the respondents to cross-examine. Under item No. 7 it was directed that the evidence of certain facts specified therein be received at the trial by statements on oath of information and belief. This means that hearsay evidence of these facts would be admissible. Certainly the petitioner has to prove the facts in accordance with the law of evidence and hearsay evidence is inadmissible. That direction in item No. 7 should therefore be deleted from the order.

The appeal is allowed with costs here and in the High Court. The deposit should be refunded to the appellants.

Also found at [1988] 2 CLJ 6